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Supreme Court of the United States

OCTOBER TERM, 1948

No. 42

AUGUST KLAPPROTT, PETITIONER,

vs.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR CERTIORARI FILED APRIL 10, 1948.
CERTIORARI GRANTED MAY 17, 1948.

Supreme Court of the United States

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[fol. a]

IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 9382

AUGUST KLAPPROTT, Appellant,

vs.

UNITED STATES OF AMERICA, Appellee

APPENDIX TO BRIEF FOR APPELLANT

[fol. 1] IN UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

DOCKET ENTRIES

May 12, 1942. Complaint, filed.

May 13, 1942. Summons issued

May 18, 1942. Summons returned served personally May 15, filed.

July 17, 1942. Case called, Court ordered Default for failure to answer, and also for entry of judgment cancelling certificate of naturalization. (Smith).

July 21, 1942. Judgment cancelling Naturalization certificate, filed.

Nov. 2, 1942. Order amending judgment insofar as date of admission is concerned, filed.

Jan. 8, 1947. Petition and order to show cause why judgment cancelling Naturalization Certificate should not be reopened, filed 1/7/47 (Smith) Notice mailed.

Jan. 28, 1947. Hearing on petition to vacate judgment. Ordered decision reserved. Briefs to be submitted.

Feb. 7, 1947. Opinion, filed (Smith) (Petition to vacate judgment, dismissed.) Order to be submitted.

Feb. 18, 1947. Order denying petition to vacate judgment, filed 2-17-47 (Smith) Notice mailed.

Mar. 19, 1947. Notice of Appeal, filed Mar. 17.

Mar. 19, 1947. Copies forwarded to Edgar H. Rossbach, Esq., and to the Clerk, U. S. C. C. A.

Mar. 19, 1947. Designation of Record on Appeal, and acknowledgment of service, filed Mar. 17, 1947.

[fol. 2] IN UNITED STATES DISTRICT COURT

COMPLAINT

The United States of America, by Charles M. Phillips, United States Attorney for the District of New Jersey, pursuant to Section 338, Nationality Act of 1940 (Title 8 USCA, Sec. 738) says:

1. The defendant, August Klapprott, was a citizen and national of the German Reich on and prior to November 16, 1933.

2. The defendant duly filed in the office of the Clerk of the Common Pleas Court, Hackensack, on July 27, 1933, a petition (No. 18339) praying that he be admitted to citizenship in the United States of America. In his petition the defendant averred among other things that he was attached to the principles of the Constitution of the United States and well disposed to the good order and happiness of the United States; that it was his intention in good faith to become a citizen and to reside permanently in the United States and that it was his intention to renounce absolutely and entirely all allegiance and fidelity to any foreign state or sovereignty to which he was at the time of his petition a subject or a citizen.

3. In due course, the Court had a hearing on the petition of the defendant and on November 16, 1933, entered a judgment thereon admitting the defendant to citizenship.

4. Accordingly, as provided by statute on November 16, 1933, the defendant was administered and took the oath required for naturalization thereupon solemnly declaring before God and in open court that he absolutely and entirely renounced and adjured all allegiance and fidelity to the state or sovereignty of the German Reich; that he would support and defend the Constitution and laws of the United States against all enemies, foreign and domestic; that he would bear true faith and allegiance to the same, and that he took the obligation freely and without any mental reservation or purpose of evasion.

[fol. 3] 5. The oath made by the defendant to the petition and of renunciation of allegiance to the German Reich was false and, thereby, he fraudulently and illegally obtained an order for admission to citizenship, and the certificate of naturalization (No. 370-7549), which was received

by the defendant on November 16, 1933, should be revoked and cancelled for the following reasons:

At the time the defendant took the oath to the petition for naturalization and the oath of allegiance to the United States of America, and renounced his allegiance to the German Reich, the defendant well knew and realized he was not attached to the principles of the Constitution of the United States and he did not in fact intend to renounce and abjure absolutely and entirely his allegiance and fidelity to the state or sovereignty of the German Reich of which he was theretofore a subject or citizen and, further, that he would not bear true faith and allegiance to the Constitution of the United States of America against all enemies, foreign and domestic, and further that he did not take the obligations of the oath freely and without any mental reservation or purpose of evasion.

6. In particular, and among other things, the plaintiff charges that contrary to the oaths prescribed by law for admission to citizenship, and received and taken by the defendant:

The defendant is and has been notoriously and openly one of the chief leaders and active members of the German-American Bund and its affiliates in and about the district of New Jersey. He has been president of the German-American Bund and director of Camp Nordland; Vice-President of the A. V. Publishing Company; member of the Board of the A. V. Development Corporation; head of the Protective Citizens' League, Inc.; trustee for the Eastern Department of National Protective Trustees.

[fol. 4] From time to time and subsequently to 1935, the defendant has made, both in writing and in speeches, numerous statements indicating his allegiance and loyalty to the German Reich and his disregard and disrespect for the principles and institutions of the United States of America.

The principles of the organizations referred to above are inimical to the Constitution of the United States and to the good order and happiness of the United States, and in fact were propagated and encouraged by the present enemies of the United States including persons who believe in the ideology enunciated by

Adolph Hitler and the present ruling party of the German Reich.

7. The defendant resides at Camp Nordland in the Municipality of Andover, County of Sussex and District of New Jersey and within the jurisdiction of this Court.

The plaintiff asks for judgment revoking and setting aside the order admitting the defendant to citizenship in the United States of America, and cancelling the certificate of naturalization delivered to the defendant and directing the defendant to surrender the certificate to the Commissioner of Immigration and Naturalization, and that the defendant be forever restrained and enjoined from using and claiming any rights, privileges and benefits obtained by reason of his naturalization, and that the Clerk of this Court be directed to transmit a certified copy of the judgment entered herein, together with the certified copy of the judgment of naturalization to the Commissioner of Immigration and Naturalization, if surrendered, and further, that the Clerk of this Court transmit a certified copy [fol. 5] of the judgment to the Clerk of the Common Pleas Court, Hackensack, and that the plaintiff have such other and further relief as may be judged proper.

Charles M. Phillips, United States Attorney, Richard J. Hughes, Asst. United States Attorney.

Trenton, New Jersey, May 12, 1942.

County of Essex,
District of New Jersey, ss:

W. Rulon Paxman, being duly sworn on his oath, deposes and says:

1. I am a Special Agent of the Federal Bureau of Investigation, U. S. Department of Justice, and I am assigned to duty in the Newark Field Division at Newark in the District of New Jersey and in the course of my official duty I have examined the files of the Federal Bureau of Investigation and in cooperation with the Immigration and Naturalization Service of the Department of Justice, I have received from the official files the facts concerning the Naturalization proceedings of the subject, August Klapprott.

2. I have heretofore presented a statement of the facts in this matter to Thorn Lord, Assistant United States Attorney for the District of New Jersey.

3. I have this day read the annexed copy of the form of complaint entitled United States of America v. August Klapprott, dated May 12, 1942 to which this is attached and the facts stated therein are true to the best of my knowledge and belief and the sources of the said facts are the official records of the files of the Federal Bureau of Investigation and the Immigration and Naturalization Service of the Department of Justice.

[fol. 6] 4. I have been officially advised by the said Thorn Lord, Assistant United States Attorney that in the opinion of the United States Attorney the facts presented to him by me and set out in the annexed form of complaint state a good cause for action under the provisions of Section 738 of Title 8, U. S. C. A. for the revocation of the Naturalization of August Klapprott.

W. Rulon Paxman, Special Agent, Federal Bureau of Investigation.

Sworn and subscribed to before me at Newark, New Jersey, this 12th day of May, 1942.

Stanley Ruttcowski, Notary Public of New Jersey.

[fol. 7] IN UNITED STATES DISTRICT COURT

JUDGMENT

It appearing to the Court that on July 17, 1942, the Clerk of the United States District Court, at the request of the United States Attorney, duly entered the default of the defendant for failure to answer within the time limited therefor;

On the motion of Charles M. Phillips, United States Attorney for the District of New Jersey, (Thorn Lord, Asst. United States Attorney):

It is, on this 17th day of July, 1942, adjudged and ordered that the decree and order of the Common Pleas Court, Hackensack, New Jersey, made and entered on the 27th day of July, 1933, admitting the defendant to be and become a citizen of the United States, be and the same is hereby set aside and held of no effect;

And it is further adjudged and ordered that the Certificate of Naturalization issued to the defendant by the Common Pleas Court, Hackensack, New Jersey, be and the same is hereby cancelled, and the defendant be and he hereby is forever enjoined and restrained from setting up and claiming any rights, privileges or advantages under the said decree and order and under the said Certificate;

And it is further adjudged and ordered that the Clerk of this Court transmit a certified copy of this judgment as well as the aforesaid Certificate of Naturalization, if surrendered, to the District Director, Bureau of Naturalization, U. S. Department of Justice;

And it is further adjudged and ordered that the Clerk of this Court transmit a certified copy of this judgment to the Clerk of the Court of Common Pleas, Hackensack, New Jersey.

William J. Smith, United States District Judge.

[fol. 8] IN UNITED STATES DISTRICT COURT

ORDER AMENDING JUDGMENT

It appearing to the Court that due to a clerical inadvertence the correct calendar date of the admission of the defendant August Klapprott to citizenship in the United States of America by way of naturalization is erroneous and it further appearing that the correct and proper date of admission is a matter of public record appearing in the official records of the Clerk of the Court of Common Pleas, Hackensack, New Jersey, and that the aforesaid date is November 16, 1933.

It is on this 2nd day of November, 1942, ordered and adjudged that the Judgment revoking the naturalization of the defendant August Klapprott be hereby amended so that the date of the admission of the defendant to citizenship in the United States of America set out in the 9th line of page 1 of the Order shall be November 16, 1933 and that in all other respects the said Judgment dated July 17, 1942 shall remain in full force and effect.

William J. Smith, United States District Judge.

[fol. 9] IN UNITED STATES DISTRICT COURT

PETITION FOR ORDER TO SHOW CAUSE

To the Honorable, the Judges of the United States District Court for the District of New Jersey:—

The petition of August Klapprott, the above named defendant, respectfully shows that:—

1. Petitioner was served with a summons and complaint in the above matter, in which the United States of America was seeking to obtain a judgment revoking and cancelling the certificate of naturalization No. 370-7549 which was received by petitioner on November 16th, 1933.

2. At the time that petitioner received the summons and complaint, his circumstances were such that it was not possible for petitioner to enter a proper defense, as a result of which a judgment was entered against petitioner on the 21st day of July, 1942, cancelling his aforesaid naturalization certificate.

3. The facts surrounding petitioner's failure to enter a defense to the aforementioned action were as follows:— a short time prior to the date of the service of the said summons and complaint upon petitioner, he had been confined in Christ Hospital in Jersey City, New Jersey, having been very seriously ill, suffering from stomach ulcers, the seriousness of which illness was such that petitioner was at times in danger of losing his life, and during which time petitioner required two blood transfusions. Upon his release from the hospital, petitioner was in very poor health, as a result of which he was advised to live in a place where he could receive proper rest and relaxation. Since petitioner was in very poor financial circumstances and in view of his affiliations with the German-American Bund, which was at that time the owner of a recreation camp at Andover, New Jersey, known as Camp Nor-land, petitioner made arrangements to live at Camp Nordland until such time as his health improved.

[fol. 10] 4. While living at Camp Nordland and on the 15th day of May, 1942, petitioner was served with the summons and complaint in the abovementioned proceeding. In view of his poor physical condition, petitioner was unable to get around very well and since he was also in very poor

financial condition, petitioner had no money with which to retain a lawyer to represent him. In order to obtain some legal assistance, petitioner wrote out and addressed a letter to the American Civil Liberties Union of New York, in which he explained that he had no money with which to retain a lawyer and requested that they arrange for some legal assistance for him. This letter was in petitioner's possession on the day of his arrest and was taken away from him by the Federal Bureau of Investigation, and so far as petitioner knows, it was never mailed and is undoubtedly in the hands of the United States Department of Justice. Petitioner had also drawn up a draft of an answer to the complaint and was working on it at the time of his arrest, but because of the fact that he was taken into custody, petitioner was unable to complete it and it was left at petitioner's home when he was taken away.

5. Before the time expired for filing an appearance and on or about July 7th, 1942, petitioner was taken into custody by the Federal authorities on an indictment which was found against petitioner in the United States District Court for the Southern District of New York, along with many other persons, all of them being charged with a conspiracy to violate the Selective Service Act. Since petitioner had no funds with which to retain an attorney, the court appointed an attorney, by the name of McDonald, to defend him and at that time petitioner brought the question of the denaturalization proceedings to his attention. This attorney promised to look into the matter, but petitioner later found out that instead of doing so, he neglected the matter entirely and permitted the judgment to be entered against petitioner by default, after having, by his prom-
[fol. 11] ises, lulled petitioner into a sense of security with respect to this matter.

6. The indictment on the charge of conspiracy to violate the Selective Service Act was tried in New York City and at all times during a very lengthy trial, petitioner was kept in custody under an exceedingly high bail, and since petitioner was unable to furnish such bail and was unable to get around, he was still unable to take any steps in connection with the denaturalization proceedings. Petitioner was found guilty of the said conspiracy charge and although an appeal was filed, petitioner continued to remain in cus-

tody until June, 1943, at which time petitioner decided to begin the service of his sentence and was transferred to the Federal Correction Institution at Milan, Michigan. Petitioner remained at the said Federal Correction Institution at Milan, Michigan, until January 30th, 1944, when he was transferred to the District of Columbia, having been indicted with twenty-nine other persons in the case of United States vs. Joseph McWilliams, et als., also referred to as "The Sedition Case."

7. The aforesaid sedition case took about eight months of trial and as a result of the untimely death of the Judge, a mistrial was declared sometime about the first part of December, 1944. Petitioner was kept in custody continuously thereafter and until November 21st, 1946, when he was released by reason of the fact that the Chief Justice of the District Court of the United States for the District of Columbia ordered the indictment dismissed, and since there were no further convictions or indictments pending against petitioner, he was released, but petitioner was then immediately remanded to custody for the purpose of deportation, and petitioner is at present confined at Ellis Island, New York, awaiting the pleasure of the United States Government with respect to his possible deportation.

[fol. 12] 8. During the month of July, 1945, petitioner and a number of other persons instituted an action in the District Court of the United States for the District of Columbia, in an effort to obtain an injunction against the Department of Justice to prevent deportation, but that relief was denied by the District Court and the United States Court of Appeals in the District of Columbia, and the United States Supreme Court also denied certiorari on December 9th, 1946.

9. Petitioner's reasons for failing to file an answer or enter an appearance in the aforesaid denaturalization proceedings are set forth above, but petitioner wishes to reiterate that it was never his intention to permit this matter to go by default. Since he was seriously ill, physically, and since he was in custody during all of the time above-mentioned, and since he had no financial means of obtaining proper legal representation, petitioner was unable to defend the aforesaid proceedings, but petitioner believes that he has a good and legal defense to such action, and if given

an opportunity, petitioner is satisfied that he will be able to produce proof in support of such defense.

10. Petitioner denies the allegations in the complaint filed in the said cause of action insofar as they allege that the oath made by petitioner to the petition and of renunciation of allegiance to the German Reich was false and that he fraudulently and illegally obtained an order for admission to citizenship, and the certificate of naturalization No. 370-7549 received by petitioner on November 16th, 1933.

11. Petitioner also denies the allegation that at the time he took the oath to the petition for naturalization and the oath of allegiance to the United States of America and renounced his allegiance to the German Reich that he well knew and realized that he was not attached to the principles of the Constitution of the United States and petitioner denies that he did not in fact intend to renounce [fol. 13] his allegiance and fidelity to the German Reich. Petitioner also denies that at the time he took the aforementioned oaths that it was his intention not to bear true faith and allegiance to the Constitution of the United States, and petitioner also denies that he did not take the obligations of oath freely and without any mental reservation or purpose of evasion.

12. Petitioner was born in Brochthausen, Germany, on September 4th, 1906, and came to the United States of America in 1927. He shortly thereafter made the necessary applications for naturalization and on November 16th, 1933, petitioner was admitted to citizenship in the United States. On November 17th, 1936, petitioner was married to his present wife, Hedwig Klapprott, who was and she is an American citizen, and they have one child, Sieglinde, who was born on June 12th, 1940.

13. Ever since petitioner came to this country in the year 1927, he has always lived here and it was never his intention to do anything other than to remain in this country and live here as a citizen of the United States.

14. At the time that petitioner obtained his certificate of citizenship and at all times prior thereto and for many years thereafter, the United States of America was not at war with the German Reich, and during all of that time his affiliations with the German-American Bund and other Germanic organizations were permitted by the Constitu-

tion and Laws of the United States of America and all speeches, writings and other statements made by petitioner were likewise permitted under the right of free speech granted to petitioner under the Constitution and Laws of the United States, and nothing that was ever said by petitioner did in any way directly or indirectly indicate a desire or intention to do or participate in any treasonal act in connection with the United States Government, and particularly did petitioner never by any speeches, actions, writings or acts indicate that at the time that his applica- [fol. 14] tion for citizenship was made and that his certificate of citizenship was entered into, petitioner was guilty of any of the things charged against him in the aforesaid complaint.

15. Petitioner further shows that the judgement entered herein is based only upon the pleadings and the action and was entered without proofs of the allegations of the complaint as without findings of fact and conclusions of law based thereon.

16. Defendent further shows that the allegations of the complaint, even if considered as admitted, by reason of the petitioner's failure to answer the same, do not meet the requirements of the clear, unequivocal and convincing proof required as a basis of the judgment.

Wherefore, petitioner prays that an order be made requiring the United States of America to show cause why the judgment cancelling petitioner's naturalization certificate should not be reopened, set aside or vacated, and petitioner given an opportunity to enter a defense in this cause on the merits.

And your petitioner will ever pray, etc.

Laurence Semel, Attorney for Petitioner.

State of New York,
County of New York, ss:

August Klapprott, being duly sworn, on his oath, according to law, deposes and says:—

1. I am the petitioner mentioned in the foregoing petition and the facts set forth therein are true.

2. I was served with a summons and complaint in the case of United States of America against myself, Civil

Action No. 2190, in which the United States of America was seeking to obtain a judgment revoking and cancelling [fol. 15] the certificate of naturalization No. 370-7549 which was received by me on November 16th, 1933.

3. At the time that I received the summons and complaint, my circumstances were such that it was not possible for me to enter a proper defense, as a result of which a judgment was entered against me on the 21st day of July, 1942, cancelling my aforesaid naturalization certificate.

4. The facts surrounding my failure to enter a defense to the aforementioned action were as follows:— a short time prior to the date of the service of the said summons and complaint upon me, I had been confined in Christ Hospital in Jersey City, New Jersey, having been very seriously ill, suffering from stomach ulcers, the seriousness of which illness was such that I was at times in danger of losing my life and during which time I required two blood transfusions. Upon my release from the hospital, I was in very poor health, as a result of which I was advised to live in a place where I could receive proper rest and relaxation. Since I was in very poor financial circumstances and in view of my affiliations with the German-American Bund, which was at that time the owner of a recreation camp at Andover, New Jersey, known as Camp Nordland, I made arrangements to live at Camp Nordland until such time as my health improved.

5. While living at Camp Nordland and on the 15th of May, 1942, I was served with the summons and complaint in the above-mentioned proceeding. In view of my poor physical condition, I was unable to get around very well and since I was also in very poor financial condition, I had no money with which to retain a lawyer to represent me. In order to obtain some legal assistance, I wrote out and addressed a letter to the American Civil Liberties Union of New York, in which I explained that I had no money with which to retain a lawyer and requested that they arrange for some legal assistance for me. This letter [fol. 16] was in my possession on the day of my arrest and was taken away from me by the Federal Bureau of Investigation, and so far as I know it was never mailed and is undoubtedly in the hands of the United States Department of Justice. I had also drawn up a draft of an

answer to the complaint and was working on it at the time of my arrest, but because of the fact that I was taken into custody, I was unable to complete it and it was left at my home when I was taken away.

6. Before the time expired for filing an appearance and on or about July 7th, 1942, I was taken into custody by the Federal authorities on an indictment which was found against me in the United States District Court for the Southern District of New York, along with many other persons, all of us being charged with a conspiracy to violate the Selective Service Act. Since I had no funds with which to retain an attorney, the court appointed an attorney, by the name of McDonald, to defend me and at that time I brought the question of the denaturalization proceedings to his attention. This attorney promised to look into the matter, but I later found out that instead of doing so, he neglected the matter entirely and permitted the judgment to be entered against me by default, after having, by his promises, lulled me into a sense of security with respect to this matter.

7. The indictment on the charge of conspiracy to violate the Selective Service Act was tried in New York City and at all times during a very lengthy trial, I was kept in custody under an exceedingly high bail, and since I was unable to furnish such bail and was unable to get around, I was still unable to take any steps in connection with the denaturalization proceedings. I was found guilty of the said conspiracy charge and although an appeal was filed, I continued to remain in custody until June, 1943, at which time I decided to begin the service of my sentence and was transferred to the Federal Correction Institution [fol. 17] at Milan, Michigan. I remained at the said Federal Correction Institution at Milan, Michigan, until January 30th, 1944, when I was transferred to the District of Columbia, having been indicted with twenty-nine other persons in the case of United States vs. Joseph McWilliams, et als., also referred to as "The Sedition Case."

8. The aforesaid sedition case took about eight months of trial and as a result of the untimely death of the Judge, a mistrial was declared sometime about the first part of December, 1944. I was kept in custody continuously thereafter and until November 21st, 1946, when I was released by reason of the fact that the Chief Justice of the District

Court of the United States for the District of Columbia ordered the indictment dismissed, and since there were no further convictions or indictments pending against me, I was released, but I was then immediately remanded to custody for the purpose of deportation, and I am at present confined at Ellis Island, New York, awaiting the pleasure of the United States Government with respect to my possible deportation.

9. During the month of July, 1945, I and a number of other persons instituted an action in the District Court of the United States for the District of Columbia, in an effort to obtain an injunction against the Department of Justice to prevent deportation, but that relief was denied by the District Court and the United States Court of Appeals in the District of Columbia, and the United States Supreme Court also denied certiorari on December 9th, 1946.

10. My reasons for failing to file an answer or enter an appearance in the aforesaid denaturalization proceedings are set forth above, but I wish to reiterate that it was never my intention to permit this matter to go by default. Since I was seriously ill, physically, and since I was in custody during all of the time abovementioned, and since I had no financial means of obtaining proper legal repre-
[fol. 18] sentation, I was unable to defend the aforesaid proceedings, but I believe that I have a good and legal defense to such action, and if given an opportunity, I am satisfied that I will be able to produce proof in support of such defense.

11. I deny the allegations in the complaint filed in the said cause of action insofar as they allege that the oath made by me to the petition and of renunciation of allegiance to the German Reich was false and that I fraudulently and illegally obtained an order for admission to citizenship, and the certificate of naturalization No. 370-7549 received by me on November 16th, 1933.

12. I also deny the allegation that at the time I took the oath to the petition for naturalization and the oath of allegiance to the United States of America and renounced my allegiance to the German Reich that I well knew and realized that I was not attached to the principles of the Constitution of the United States and I deny that I did not in fact intend to renounce my allegiance and fidelity to the German Reich. I also deny that at the time I took the

aforementioned oaths that it was my intention not to bear true faith and allegiance to the Constitution of the United States, and I also deny that I did not take the obligations of oath freely and without any mental reservation or purpose of evasion.

13. I was born in Brochthausen, Germany, on September 4th, 1906, and came to the United States of America in 1927. I shortly thereafter made the necessary applications for naturalization and on November 16th, 1933, I was admitted to citizenship in the United States. On November 17th, 1936, I married my present wife, Hedwig Klapprott, who was and she is an American citizen, and I have one child, Sieglinde, who was born on June 12th, 1940.

14. Ever since I came to this country in the year 1927, I have always lived here and it was never my intention [fol. 19] to do anything other than to remain in this country and live here as a citizen of the United States.

15. At the time that I obtained my certificate of citizenship and at all times prior thereto and for many years thereafter, the United States of America was not at war with the German Reich, and during all of that time my affiliations with the German-American Bund and other Germanic organizations were permitted by the Constitution and Laws of the United States of America, and all speeches, writings and other statements made by me were likewise permitted under the right of free speech granted to me under the Constitution and Laws of the United States, and nothing that was ever said by me did in any way directly or indirectly indicate a desire or intention to do or participate in any treasonal act in connection with the United States Government, and particularly did I never by any speeches, actions, writings or acts indicate that at the time that my application for citizenship was made and that my certificate of citizenship was entered into, I was guilty of any of the things charged against me in the aforesaid complaint.

August Klapprott.

Sworn to and subscribed before me this 12th day of December, 1946. Alice G. Palmer, Notary Public, State of New York, Residing in N. Y. Co. No. 271. Reg. No. 547-F-7. Commission expires March 30, 1947.

[fol. 20] IN UNITED STATES DISTRICT COURT

ORDER TO SHOW CAUSE

This matter being opened to the court by Laurence Semel, attorney for defendant, and the court having read and considered the petition and verifying affidavit filed by the defendant in the above cause, it is, on this 6th day of January, 1947,

Ordered, that the United States of America do show cause before this court, to be holden at the United States Court House, Federal Square, Newark, New Jersey, in Court Room No. 3, on Monday, the 27th day of January, 1947, at 10:30 o'clock in the forenoon, or as soon thereafter as counsel may be heard, why the prayers in the aforementioned petition should not be granted, and it is further

Ordered, that true but uncertified copies of the petition, affidavit and this order be served upon the United States District Attorney for the State of New Jersey, within 7 days from the date hereof.

William J. Smith, Judge.

[fol. 21] IN UNITED STATES DISTRICT COURT

OPINION

SMITH, District Judge:

This is a civil proceeding instituted by the United States Attorney, pursuant to Section 338 of the Nationality Act of 1940, 54 Stat. 1158, 8 U. S. C. A. 738, to revoke the order admitting the defendant to citizenship and to cancel the certificate of naturalization issued thereon on the grounds of fraud and illegality.

The original complaint, filed on May 12, 1942, charged that the certificate of naturalization was illegally and fraudulently procured and sought its cancellation on these grounds. The summons and complaint were personally served upon the defendant on May 14, 1942. The defendant failed to appear and defend within the time prescribed in the summons, to wit, sixty days, and a default judgment in conformity with the prayer of the complaint was entered on July 16, 1942. Thereafter no action was taken by the defendant until the present petition was filed on January 7, 1947.

The proceeding is now before the Court on the verified "petition" of the defendant to open, vacate and set aside the default judgment entered herein. The authority of the Court to grant relief at this time is challenged by the plaintiff.

It clearly appears from the affidavit of the defendant that his failure to appear and defend within the time prescribed was imputable to his own willful and inexcusable neglect. The excuses belatedly advanced in his affidavit, to wit, illness, confinement, and lack of opportunity, are not persuasive. We shall, however, consider, the excuses in the light most favorable to the defendant, and, notwithstanding our firm conviction to the contrary, assume that the default was ascribable to his "mistake, inadvertence, surprise, or excusable neglect." Even this assumption is of no avail to the defendant.

[fol. 22] Rule 60(b) of the Rules of Civil Procedure, 28 U. S. C. A., foll. 723(c) specifically preserves the traditional authority of the Court, on motion, to "relieve a party or his legal representative from a judgment, order, or proceeding taken against him through his mistake, inadvertence, surprise, or excusable neglect." This rule, however, imposes a mandatory limitation on the time within which the motion shall be made. It is therein provided that the "motion shall be made within a reasonable time, *but in no case exceeding six months after such judgment, order, or proceeding was taken.*" (Emphasis by the Court.) There is no discretionary power in the Court to extend this period of limitation. It necessarily follows that the present petition, regarded as a formal motion under the said rule, is barred.

The said rule, however, expressly excepts from its application the power of the Court "to entertain an action to relieve a party from a judgment, order or proceeding." This exception, liberally interpreted, preserves the historic authority of the Court to entertain either a bill of review or a bill in the nature of a bill of review in a proper case. Fraser v. Doing, 130 F. 2d 617, 620; Wallace v. United States, 142 F. 2d 240, 244; Moore's Federal Practice, Vol. 3, Pgs. 3255-3276. These equitable remedies, as thus preserved, are still governed by the established principles of the common law.

The present "petition," notwithstanding its form, should be regarded as a bill of review, and we shall so regard it. It is our opinion, however, that as such it is not maintainable for two reasons: first, the lack of grounds sufficient to sustain it; and second, the inexcusable delay of the defendant in pursuing the remedy. It is well established that the presence of either reason requires the dismissal of the bill. [fol. 23] A bill of review, as an equitable remedy under the common law, had its origin in the first Ordinance of Lord Chancellor Bacon.[1] The general rule adopted by our courts is the same as the Ordinance in legal effect. Whiting v. Bank of the United States; 13 Pet. 6, 14 (38 U. S.). It is now well established that a bill of review is maintainable on only two grounds: "first, error of law apparent on the face of the record without further examination of matters of fact; and second, new facts discovered since the decree, which should materially affect the decree and probably induce a different result."[2] Scotten v. Littlefield, 235 U. S. 407, 411. Accord: Shelton v. Van Kleeck, 106 U. S. 532, 534; Nickle v. Stewart, 111 U. S. 776; Willamette Iron Bridge Co. v. Hatch, 125 U. S. 1, 7; Cocke v. Copenhaver, 126 Fed. 145, 147; Dowagiac Mfg. Co. v. McSherry Mfg. Co., 155 Fed. 524, 527; Rudolph v. Hunt, 286 Fed. 1007, 1009; Simonds v. Norwich Union Indemnity Co.,

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[1] "No decree shall be reversed, altered, or explained, being once under the great seal, but upon bill of review; and no bill of review shall be admitted, except it contain either error in law, appearing in the body of the decree, without further examination of matters in fact, or some new matter which hath risen in time after the decree and not any new proof which might have been used when the decree was made. Nevertheless, upon new proof that is come to light after the decree made, and could not possibly have been used at the time when the decree passed, a bill of review may be grounded by the special license of the court, and not otherwise." Street, Equity Practice (1909), Vol. 2, 1256; Purcell v. Miner, 4 Wall. 513, 521.

[2] It appears from several of the later cases that fraud is now considered a proper ground upon which to predicate a bill of review. The formal distinction between a bill of review and a bill in the nature of a bill of review is disregarded. See Hazel-Atlas Co. v. Hartford Co., 322 U. S. 238.

73 F. 2d 412, 415; Irvin v. Buick Motor Co., 88 F. 2d 947, 949; Brady v. Beams, 132 F. 2d 985, 986; Lehman Co. v. Appleton Toy & Furniture Co., 148 F. 2d 988, 989. The bill of review ("petition"), in the instant case presents neither of these grounds.

It is contended by the defendant that "the allegations of the complaint, even if considered as admitted, by reason of the (defendant's) failure to answer the same, do not meet the requirements of the clear, unequivocal and con- [fol. 24] vincing proof required as a basis of the judgment." This contention presupposes that a default judgment may be entered only upon proof of the allegations of the complaint, and with this we cannot agree. The allegations of the original complaint were sufficient to support the charge that the certificate of naturalization was illegally and fraudulently procured. The failure of the defendant to appear and answer these allegations within the time prescribed was an implied admission of the ultimate facts sufficient to warrant the entry of judgment by default.

The present "petition" must be considered a bill of review for error of law apparent upon the record, no other ground except that hereinabove quoted having been urged. The remedy is not restricted as to time by any mandatory limitation but is governed by the equitable doctrine of laches. The courts, however, have uniformly held that a bill of review for error of law apparent upon the record is in the nature of a writ of error and ordinarily must be brought within the time limited for an appeal. Esminger v. Powers, 108 U. S. 292, 302; Central Trust Co. v. Grant Locomotive Works, 135 U. S. 207, 227; McDonald v. Whitney, 39 Fed. 466, 467; Halsted v. Forrest Hill Co., 109 Fed. 820, 823; Cocke v. Copenhaver, supra; Hagerott v. Adams, 61 F. 2d 35, 36; Peeke v. Citizens Banking Co., 81 F. 2d 112, 114. The analogy has apparently prompted the adoption of the time limited for an appeal as a reasonable limitation on the remedy. Ibid.

This action was initiated by the defendant more than four years after the entry of final judgment in the original proceedings. This undue delay is imputable entirely to his willful and inexcusable neglect. The action must, therefore, be dismissed because of the defendant's laches. It is our opinion that the defendant's initiation of this action at this late date was not prompted by any desire to

assume the duties of citizenship but by a recent realization of the serious consequences attendant upon the loss of its [fol. 25] privileges. The defendant's motives should not, and do not, influence our ultimate decision, but we have thought it well to examine his tenuous excuses for delay in their light.

The defendant's verified "petition" presents nothing more than a defense which should have been presented in the original proceeding. This defense cannot be urged at this time as a ground for relief from the judgment entered therein. Helms v. Holmes, 129 F. 2d 263, 265; In re Innis, 140 F. 2d 479, 481. The jurisdiction of equity cannot be invoked except on the grounds hereinabove discussed.

The defendant's petition shall be dismissed. The plaintiff shall prepare and submit forthwith a proper order of dismissal.

[fol. 26] IN UNITED STATES DISTRICT COURT

ORDER DISMISSING PETITION

This matter having come on to be heard on petition of the defendant to open, vacate and set aside the default judgment entered against him herein, and objection to said petition having been presented by Edgar H. Rosshach, United States Attorney for the District of New Jersey (by Edward V. Ryan, Assistant United States Attorney) in the presence of Laurence Semel, attorney for defendant, on several grounds including the challenge to the jurisdiction of this court at this time; now therefore, in accordance with the views expressed in the opinion filed in this matter February 7, 1947.

It is on this 17th day of February, 1947, Ordered that the petition filed herein on January 6, 1947, by which defendant seeks to have the judgment entered against him on July 17, 1942 vacated, and the order to show cause entered herein January 7, 1946, which is based on said petition, be and the same are hereby dismissed.

William J. Smith, United States District Judge.

Consent is hereby given to the form of the above Order.

Laurence Semel, Attorney for Defendant.

[fol. 27] IN UNITED STATES DISTRICT COURT

NOTICE OF APPEAL

Notice is hereby given this day of March, 1947, that August Klapprott hereby appeals to the United States Circuit Court of Appeals for the Third Circuit from the judgment of this Court entered on the 18th day of February, 1947, in favor of United States of America against said August Klapprott.

August Klapprott, Attorney pro se.

Service acknowledged March 17, 1947.

Edgar H. Rossbach, U. S. Attorney.

[fol. 28] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

Appeal No. 9382

AUGUST KLAPPROTT, Appellant,

vs.

UNITED STATES OF AMERICA, Appellee

NOTICE OF MOTION TO DISMISS APPEAL

To August Klapprott, Appellant c/o Immigration & Naturalization Service, Ellis Island, New York City, N. Y. and P. Bateman Ennis and W. Clifton Stone, Esquires, Attorneys for Appellant, Shoreham Building, Washington, D. C.

SIRS:

Please take notice that on Monday, June 16, 1947 (D. S. T.) at 10:30 o'clock in the forenoon, or as soon thereafter as the matter shall be heard, we shall move before the Honorable the Judges of the United States Circuit Court of Appeals for the Third Circuit, at the Federal Building, Philadelphia, Pennsylvania, for an order requiring the appellant herein to post bond for security for costs on this appeal forthwith or in the alternative, that the above appeal be dismissed for failure to file such bond on appeal.

Edgar H. Rossbach, United States Attorney, by Edward V. Ryan, Assistant United States Attorney.

Endorsements: Notice of Motion by Appellee to Dismiss Appeal. Received & Filed June 11, 1947. Wm. P. Rowland, Clerk.

[fol. 29] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

Appeal No. 9382

AUGUST KLAPPROTT, Appellant,

vs.

UNITED STATES OF AMERICA, Appellee

ON NOTICE OF MOTION TO DISMISS APPEAL

Affidavit

STATE OF NEW JERSEY,
County of Essex, ss:

Edward V. Ryan, of full age, being duly sworn according to law, upon his oath deposes and says:

1. I am an Assistant United States Attorney for the District of New Jersey, and in active charge of the above matter on behalf of the United States.

2. On June 9, 1947, I forwarded a copy of a notice of motion to require the appellant herein to file bond on appeal, or in the alternative, for dismissal of such appeal, to P. Bateman Ennis, Esquire and W. Clifton Stone, Esquire, attorneys for the appellant, by placing such notice in an envelope addressed to Collins and Ennis, Esquires; Attention of: P. Bateman Ennis and W. Clifton Stone; Shoreham Building, Washington, D. C., which envelope required no postage and which envelope and contents were then and there deposited by me in the United States mail at the main Post Office, Newark, New Jersey.

Edward V. Ryan, Assistant United States Attorney. Sworn and subscribed to before me this 10th day of June, 1947. Adeline Brunkhorst, Notary Public of New Jersey.

Endorsements: Affidavit in Support of Motion to Dismiss Appeal. Received & Filed June 11, 1947. Wm. P. Rowland, Clerk.

[fol. 30] IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT—OCTOBER TERM, 1946

No. 9382

UNITED STATES OF AMERICA,

vs.

AUGUST KLAPPROTT, Appellant

And afterwards, to wit, the 16th day of June, 1947, come the parties aforesaid by their counsel aforesaid, and this case being called for argument sur Motion to Dismiss Appeal, before the Honorable Albert B. Maris, Honorable Herbert F. Goodrich and Honorable Harry E. Kalodner, Circuit Judges, and the Court not being fully advised in the premises, takes further time for the consideration thereof,

And afterwards, to wit, on the 17th day of June, 1947, come the parties aforesaid by their counsel aforesaid, and the Court, now being fully advised in the premises, renders the following Order:

[fol. 31] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 9382

UNITED STATES OF AMERICA, Plaintiff-Appellee,

vs.

AUGUST KLAPPROTT, Defendant-Appellant

ORDER PERMITTING FILING OF APPEAL BOND OUT-OF-TIME

Before Maris, Goodrich and Kalodner, Circuit Judges

After hearing Counsel on both sides in connection with Appellee's motion to dismiss,

It is ordered that Appellant be, and he hereby is, given leave to file an appeal bond out-of-time in the District Court of the United States for the District of New Jersey, in

order to perfect his appeal in the above entitled case; said bond to be filed on or before June 20, 1947.

By the Court, Maris, Circuit Judge.

June 17, 1947.

Endorsements: Order Permitting Filing of Appeal Bond Out of Time. Received & Filed June 17, 1947. Wm. P. Rowland, Clerk.

[fol. 32] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, OCTOBER TERM, 1947

No. 9382

AUGUST KLAPPROTT, Appellant,

vs.

UNITED STATES OF AMERICA

Appeal from the District Court of the United States for the District of New Jersey

And now, to-wit: this 16th day of October A. D. 1947, it is ordered that Hon. Albert Lee Stephens, U. S. Circuit Judge, for the Ninth Circuit, be, and he is hereby assigned to sit in above case in order to make a full court.

Biggs, Circuit Judge.

Endorsements: Order Assigning Hon. Albert Lee Stephens for Argument. Received & Filed Oct. 16, 1947. Ida O. Creskoff, Clerk.

[fol. 33] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, OCTOBER TERM, 1947

No. 9382

AUGUST KLAPPROTT, Appellant,

v.

UNITED STATES OF AMERICA

Appeal from the Order of the District Court of the United States for the District of New Jersey

Argued October 16, 1947

Before Albert Lee Stephens, Goodrich and O'Connell, Circuit Judges

OPINION OF THE COURT—Filed January 12, 1948

By GOODRICH, Circuit Judge:

The proceeding out of which this appeal comes was one to reopen and readjudicate a cause in which the naturalization certificate of the appellant, August Klapprott, had been cancelled.[1]

Klapprott filed a petition on January 6, 1947, to reopen the proceedings. His allegations assert the following facts: [fol. 34] On May 12, 1942, the United States District Attorney[2] commenced proceedings in the District Court of New Jersey to obtain the revocation of Klapprott's citizenship

[1] The statutory background is: 54 Stat. 1158 (1940), 8 U.S.C.A. § 738 (1942).

[2] Section 338 (a) of the Nationality Act of 1940 provides: "It shall be the duty of the United States district attorneys for the respective districts, upon affidavit showing good cause therefor, to institute proceedings in any court specified in sub-section (a) of section 301 in the judicial district in which the naturalized citizen may reside at the time of bringing suit, for the purpose of revoking and setting aside the order admitting such person to citizenship and cancelling the certificate of naturalization on the ground of fraud or on the ground that such order and certificate of naturalization were illegally procured." 54 Stat. 1158 (1940), 8 U.S.C.A. § 738(a) (1942).

on the ground that fraud had been practiced in its procurement. Klapprott had sixty days within which to answer the complaint. On the fifty-second day of that period he was taken into custody by agents of the Federal Bureau of Investigation and transferred to New York to stand trial on an indictment which alleged conspiracy to violate the Selective Service Act. On July 17, 1942, the Federal District Court in New Jersey, on motion of an United States Attorney, entered a default judgment which vacated and set aside appellant's naturalization decree. Four and one-half years later appellant commenced this proceeding to set aside or open that default judgment. The petition was dismissed by the District Court, following argument thereon and the filing of an opinion.

Our questions involve both the substantive law governing denaturalization and procedural problems under the Federal Rules. We think the case can be simplified by getting the questions concerning the statute out of the way first.

The appellant claims three errors with regard to the procedure followed by the Government in his denaturalization. He says, first, that a judgment by default cannot be taken in such proceedings. Second, he says, that in any event, proof of the charges is required before a default judgment is entered. In the third place, he says that in the denaturalization proceeedings he was not represented by counsel, as a result of which his constitutional rights [fol. 35] were violated. If any of these points can be maintained there is basis for argument that there was error on the face of the record which might be the foundation for a bill of review, a point discussed later in this opinion.

We think no one of the points is valid. While the statute concerning denaturalization does not expressly say that a judgment may be taken by default against a person who does not appear, it does provide for substitute service.[3]

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[3] "(b) The party to whom was granted the naturalization alleged to have been fraudulently or illegally procured shall, in any such proceedings under subsection (a) of this section, have sixty days' personal notice in which to make answer to the petition of the United States; and if such naturalized person be absent from the United States or from the judicial district in which such person last had

This certainly indicates that the problem of a non-resident or absent defendant was in the mind of the law makers. This, plus the fact that a judgment by default is a matter of course in any civil case where the defendant does not answer, together with the universal language of Rule 55 of the Rules of Civil Procedure, support the conclusion that a judgment by default is proper in such cases.

Klapprott's second point is that the Government should have been put to its proof before judgment by default was taken. It was argued that in divorce cases, which involve an important change of status, proof must be made and in certain types of other cases the amount of damages has to be proved before judgment can be entered. The analogies will not hold. Divorce procedure requires submission of proof because, theoretically, the state is concerned. Here the public interest is represented by the Government of the United States whose law officer initiates and conducts the proceeding. Proof is required in unliquidated damage cases because no one ever thinks that a general claim for damages represents anything but the plaintiff's limit of possible recovery and a money judgment has to be entered for some definite amount. The question of whether the facts have [fol. 36] to be proved in a default denaturalization has been raised in the Second Circuit and passed upon there adversely to the appellant's contention. United States v. Borchers, 163 F. 2d 347 (C.C.A. 2, 1947), cert. denied — U.S. — (Oct. 27, 1947). We agree with the Second Circuit.

The appellant's third point is more elaborate. Spelled out it is that the Supreme Court has specified the nature of necessary proof in denaturalization proceedings, requiring it to be "clear and unequivocal".[4] This, it is argued, is like the nature of the proof required in a criminal trial.

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his residence, such notice shall be given by publication in the manner provided for the service of summons by publication or upon absentees by the laws of the State or the place where such suit is brought." 54 Stat. 876 (1940), 8 U.S.C.A. § 738(b) (1942).

[4] This was the language used by the Supreme Court in two cases in which the defendant had filed an answer and contested the issue. Baumgartner v. United States, 322 U.S. 665 (1944); Schneiderman v. United States, 320 U.S. 118 (1943).

Therefore, denaturalization proceedings should be treated as though they were criminal and, if so, defendant is entitled to counsel. Since Klapprott had no counsel at the time default was taken against him the argument concludes that he is deprived of his constitutional rights.

There is little weight in this argument. In other situations in the law courts have laid down requirements of a higher degree of proof than the mere preponderance of the evidence presented but no one thinks the proceedings become criminal trials on that account. Thus there is authority that when one attacks a release he has the burden of sustaining his allegations by clear, precise and indubitable proof.[5] The same is true in certain types of claims based on fraud.[6] The Congress, in regulating the acquisition and loss of citizenship rights has made such proceedings civil[7] and we think the action is not changed into a [fol. 37] criminal prosecution by the fact that the Supreme Court has pointed out the necessity of clear evidence in a contested case to take away citizenship rights.

We think, therefore, that the appellant is a long way from showing any error on the face of the record which would entitle him to reopen it and make the Government prove that he made false statements when he took the oath of citizenship. He says it is not true that at that time he made false statements and he denies that he gained his citizenship by fraud. It is relevant at this point to state the additional allegations in his favor which appear from his affidavit and the petition prepared by his counsel. He alleges that at the time of his arrest in New Jersey he was at a Bund Camp recovering from an illness. On the day of his

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[5] Doneyho v. Scottdale Connecting R. Co., 330 Pa. 207, 199 Atl. 162 (1938); Vogel v. Taub, 316 Pa. 41, 173 Atl. 270 (1934); cf. Probate Court v. Enright, 79 Vt. 416, 65 Atl. 530 (1907).

[6] Burley v. Davis, 132 Conn. 631, 46 A. 2d 417 (1946); Lundie v. Walker, 126 N. J. Eq. 497, 9 A. 2d 783 (1939); Fellman v. Henderson Building & Loan Ass'n of Jersey City, 120 N. J. Eq. 367, 185 Atl. 495 (1936); New York Life Ins. Co. v. Brandwene, 316 Pa. 218, 172 Atl. 669 (1934).

[7] Cf. Sourino v. United States, 86 F. 2d 309 (C.C.A. 5, 1936), cert denied 300 U.S. 661 (1937); United States v. Wezel, 49 F. Supp. 16 (D.C. Ill. 1943).

arrest, he says, he had on his person a letter addressed to the American Civil Liberties Union in New York asking its help in defending him in the denaturalization proceedings to which he had been summoned. This letter was taken from his person when he was arrested and taken to New York for trial. He says that in New York he asked the lawyer appointed to defend him in the criminal trial to investigate the matter of the denaturalization proceedings in New Jersey and the lawyer said he would, but that nothing ever happened. Then, finally, he says, he was convicted in New York and subsequently elected to begin service of his sentence. That conviction was ultimately reversed by the Supreme Court.[8] But he was immediately arrested with others and went through a long trial in the well publicized "sedition" case in Washington, which was ended by the death of the trial judge while the case was going on. He states that it was not until the nolle prosequi of the case in Washington and the reversal of the New York conviction that he was freed from criminal charges and could give his attention to the proceedings out of which he lost his citizenship.

[fol. 38] We think none of what the appellant has said brings him within the established rules for reopening a finished piece of litigation. Furthermore, we do not think he presents the type of case where new law should be made to assist him in such reopening.

Our starting point here is, of course, Rule 60 (b) of the Rules of Civil Procedure, set out in full in the margin.[9]

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[8] The ground of reversal was that the evidence was insufficient to support the allegations that there existed a conspiracy to counsel others to evade service in the armed forces of the United States. Keegan v. United States, 325 U. S. 478 (1945).

[9] "(b) Mistake; Inadvertence; Surprise; Excusable Neglect. On motion the court, upon such terms as are just, may relieve a party or his legal representative from a judgment, order, or proceeding taken against him through his mistake, inadvertence, surprise, or excusable neglect. The motion shall be made within a reasonable time, but in no case exceeding six months after such judgment, order, or proceeding was taken. A motion under this subdivision does not affect the finality of a judgment or suspend its operation.

Perhaps the Klapprott petition could be treated as a motion; perhaps it could be argued that thus treated it sets up a case of "mistake * * * or excusable neglect". But by the very terms of the Rule a motion on such grounds must be filed within six months after judgment, not four and one half years.

The only possible theory on which there is anything more to say about reopening this case would be on the basis of the last sentence in Rule 60(b). The part we are concerned with is the clause "This rule does not limit the power of a court (1) to entertain an action to relieve a party from a judgment, order, or proceeding * * *." There has been not a little argument as to what is involved in this sentence. The opinion now is that it preserves the old common law and equitable remedies available to a party for opening up a judgment after the term.[10]

[fol. 39] This is not only the current course of decision, but has been fully worked out by Professor Moore, assisted by Elizabeth Rogers, with characteristic exactness in a most helpful article called "Federal Relief From Civil

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This rule does not limit the power of a court (1) to entertain an action to relieve a party from a judgment, order, or proceeding, or (2) to set aside within one year, as provided in Section 57 of the Judicial Code, U. S. C. Title 28, § 118, a judgment obtained against a defendant not actually personally notified."

[10] Wallace v. United States, 142 F. 2d 240 (C. C. A. 2, 1940); accord Sharlot v. Ford Motor Co., 9 Fed. Rules Serv. 60(b), 31 Case 1 (E. D. N. Y. 1945). There is no requirement that the appellant set forth for which remedy his motion is a substitute, but the rule makers, by means of the reservation which they wrote into the rule, merely recognized a power which already existed rather than created new ones or enlarged the old ones. Fraser v. Doing, 130 F. 2d 617 (App. D. C. 1942). While it is not necessary for a person seeking relief to meet a denial thereof, unless he can point to a case in which the precise situation was presented, we think he must demonstrate the relief sought by him is of the character recognized by the former writs. These are our guideposts in determining whether the case is proper for disturbing the finality of the judgment.

Judgments."[11] These remedies were bills of review, bills in the nature of bills of review, writ of audita querela, and writs of error coram nobis, or coram vobis. The Court will modestly refrain from appropriating the results of Professor Moore's research and offering those results as its own. It appears that the types of situations in which one or more of these procedural devices was available to reopen a judgment are classified, roughly, into four groups: (1) errors of law apparent on the face of the record; (2) matters arising subsequently to an entry of a judgment; (3) newly discovered evidence or fraud in the procuring of the judgment; (4) matters of fact which had not been put in issue or passed on and which were material to the validity and regularity of the proceeding itself.[12]

It is perfectly clear that when one goes over the allegations of the Klapprott petition, taking all the statements as true, there is not a thing in them which fits the set of facts there presented into any situation on which relief could be given within the bounds of these well established, but not so well known, remedies. The same is true when one checks the allegations with the grounds for opening up a judgment set out in the Restatement of Judgments, §§ 120-123, inclusive. The conclusion on this phase of the matter is that Klapprott has not shown alleged facts which brings [fol. 40] him within any of the rules heretofore established for opening up judgments duly entered.[13]

Nor do we see such equity in the appellant's situation as would induce us to create new remedies for him, even if

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[11] 55 Yale L. J. 623 (1946).

[12] See Moore, Federal Relief From Civil Judgments, 55 Yale L. J. 623, 659-682 (1946); 8 Cyc. of Federal Proc. (2d ed. 1943) §§ 3614, 3615.

[13] We reach this conclusion without regard to the answer to the question whether such proceedings would constitute a suit against the United States, not to be brought without the Government's consent. Compare Zegura v. United States, 104 F. 2d 34 (C. C. A. 5, 1939), cert. denied 308 U. S. 586 (1940) (such proceedings require governmental consent); United States v. Haas, 58 F. Supp. 179 (D. C. N. D. N. Y. 1944) (same), with Jones v. Watts, 142 F. 2d 575 (C. C. A. 5, 1944) (such consent is not necessary); United States v. Sotis, 131 F. 2d 783 (C. C. A. 7, 1942) (same).

we had the power. While Klapprott says that he did not lie when he was naturalized, the great emphasis in all the argument made for him is to the effect that he does not believe the Government now would be able to prove its case against him. This does not seem to us a very powerful reason for opening a stale case. He does not suggest that he did not know the nature of these proceedings that cancelled his citizenship. And the most that he did in preparation for them was to, on his own statement, write a letter to the American Civil Liberties Union which he never mailed. There is no fraud or intimidation suggested. On his own statement he asked for no help except on the one occasion when he asked a court appointed lawyer in New York to see about a proceeding in New Jersey. When nothing was done he did not follow it up.[14] It is quite evident that his citizenship becomes more valuable now that the war has been concluded. Germany has lost and the possibility of deportation is not a gratifying prospect.[15] We think that the rule of law which limits the bases on which litigation long since closed is to be reopened is properly applied in this case.

The order will be affirmed.

[fol. 41] O'Connell, Circuit Judge, concurring:

While there can be no doubt that a default judgment may be entered in a proceeding to cancel a certificate of citizenship, I believe that where such judgment is not based upon the presentation of evidence *ex parte*, every consideration possible should be given to the opening of such judgments, so that citizens may not be lightly deprived of the highest right within the power of the government to bestow.

It is apparent from the record that the court below had this principle in mind; for sweeping aside the technicalities,

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[14] See Restatement, Judgments § 126(2) (a), (c), (e), (f) (1942).

[15] But even at this late date Klapprott still has a proceeding in which he may be heard before a deportation order is issued against him. See In re Enemy Alien Hearing Boards, Circular No. 3616, December 13, 1942, Department of Justice, Washington, D. C.; Circular No. 3616, Supp. No. 1, January 7, 1943; Department of Justice, Washington, D. C.; cf. Citizens Protective League v. Clark, 155 F. 2d 290, 295 (App. D. C. 1946).

the district judge considered the equities of petitioner's cause. Undoubtedly the granting or denial of Klapprott's petition was a matter within his discretion, and on the basis of the record before us, I am not prepared to say that there was an abuse of that discretion. I note that Klapprott waited more than four years after the entry of the default judgment to attack its validity; and, while it is his contention that he lacked the necessary liberty and funds to pursue his petition at an earlier date, no such difficulties apparently prevented his participation with others in litigation to enjoin the Department of Justice from deporting him. See Citizens Protective League v. Clark, 155 F. 2d 290 (App. D. C., 1946), cert. den. 329 U. S. 787 (1946). I note further that, only three days after certiorari had been denied in the Citizens Protective League case, *supra*, Klapprott found himself able to present the instant petition through able counsel. There being ample evidence in the record before us to justify the finding of the court below that Klapprott had been guilty of laches, I am constrained to agree with the conclusion that the order of the district court should be affirmed.

STEPHENS, Circuit Judge, dissenting:

I dissent. I entertain serious doubt as to the legality of a decree revoking citizenship without proof being ad-
[fol. 42] duced in open court. I hold that, in the circumstances of this case, the default should be set aside.

A true Copy: Teste:

——— ———, Clerk of the United States Circuit Court of Appeals for the Third Circuit.

[fol. 43] IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, OCTOBER TERM, 1947

No. 9382

AUGUST KLAPPROTT, Appellant,

v.

UNITED STATES OF AMERICA

Present: Albert Lee Stephen, Goodrich and O'Connell, Circuit Judges.

On Appeal from the District Court of the United States for the District of New Jersey

This cause came on to be heard on the transcript of record from the District Court of the United States, for the District of New Jersey, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the order of the said District Court in this case be, and the same is hereby affirmed.

Fore the Court, Herbert F. Goodrich.

January 12, 1948.

Endorsements: Order Affirming Order of the District Court. Received & Filed Jan. 12, 1948. Ida O. Creskoff, Clerk.

[fol. 44] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 9382

UNITED STATES OF AMERICA

vs.

AUGUST KLAPPROTT, Appellant.

Upon consideration of the application by counsel for appellant,

The time for filing a petition for rehearing in the above-entitled cause is hereby extended to February 11, 1948.

Matis, Circuit Judge.

January 26, 1948.

Endorsements: Order Estending Time for Filing Petition for Rehearing. Received & Filed Jan. 26, 1948. Ida O. Creskoff, Clerk.

[fol. 45] UNITED STATES OF AMERICA
Eastern District of Pennsylvania
Third Judicial Circuit, Set.:

I, Harriet G. Humphrys, Clerk of the United States Circuit Court of Appeals for the Third Circuit, do hereby certify the foregoing to be a true and faithful copy of the original Appendix to Brief for Appellant, and proceedings in this court, in the case of United States of America vs. August Klapprott, Appellant, No. 9382, on file, and now remaining among the records of the said Court, in my office

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the said Court, at Philadelphia, this 8th day of March in the year of our Lord one thousand nine hundred and forty-eight, and of the Independence of the United States the one hundred and seventy-second.

Harriet G. Humphrys, Deputy Clerk of the U. S. Circuit Court of Appeals, Third Circuit. (Seal.)

[fol. 43] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed May 17, 1948

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(7719)